APPENDIX

[Filed Oct. 12, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 5:92 CV 345 (TFGD)

APOSTOLOS TSIMBIDAROS, *pro se*,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, *et al.*,
Defendants

August 20, 1993

DEFENDANTS' JOINT MOTION FOR SANCTIONS

October 12, 1993. The plaintiff is hereby ORDERED to show cause in writing within 20 days of this date why he should not be required to pay the defendants' attorney's fees in the amount claimed by them in this motion. The plaintiff is further advised that irrespective of the ultimate disposition of this motion, continued violation of his discovery obligations will result in the imposition of sanctions, including attorneys' fees and/or dismissal with prejudice of this lawsuit.

/s/ Thomas P. Smith
THOMAS P. SMITH
U.S. Magistrate Judge

[Filed Oct. 12, 1993]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 5:92 CV 345 (TFGD)

APOSTOLOS TSIMBIDAROS,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES and PAINTERS LOCAL UNION 1719,
Defendants

August 9, 1993

PLAINTIFF'S MOTION OBJECTING DEFENDANTS NOTICE OF DEPOSITION AND DEFENDANTS NOTICE OF INTERROGATORIES

October 12, 1993. Treating this as a motion to quash and/or a motion for protective order, it is DENIED. Plaintiff's objection to the noticing of his deposition is not well-taken. The defendants in this case have the right to take plaintiff's deposition; plaintiff's initiation of this lawsuit gave them that right. It is not at all unreasonable that the deposition which defendants seek to take be conducted in the office of defendants' attorney, nor is it unreasonablke for the plaintiff to be required to produce the documents which are specified in a subpoena duces tecum. Similarly, it is customary for depositions to continue each day until completed. Plaintiff's assertion that he "has always conveyed respect and courtesy to the attorneys representing the defendants," *id.* at 2,

is belied by the gratuitous *ad hominem* attacks which punctuate plaintiff's many filings. The defendants are free to renotice plaintiff's deposition. Plaintiff will attend that deposition and comply with any subpoena duces tecum served upon him. Plaintiff's failure to attend his deposition may result in the imposition of drastic sanctions, including dismissal of his lawsuit with prejudice.

/s/ Thomas P. Smith
THOMAS P. SMITH
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 5:92 CV 345 (TFGD)

APOSTOLOS TSIMBIDAROS, *pro se*,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, *et al.*,
Defendants

September 9, 1993

DEFENDANTS' JOINT MOTIONS TO COMPEL DISCOVERY AND CONSOLIDATED RESPONSE TO THE PLAINTIFF'S PAPERS DATED AUGUST 21, 1993, AUGUST 28, 1993, AND SEPTEMBER 4, 1993

October 12, 1993. Defendants' joint motion to compel is GRANTED. It is hereby ORDERED that: (1) the plaintiff shall within 20 days of this date provide complete, non-evasive, fully-responsive and sworn answers to the interrogatories that defendants served on him on or about August 2, 1993, the court finding that no valid objection has been interposed as to those interrogatories; (2) the plaintiff shall produce within 20 days of this date each and every document not heretofore produced which is responsive to the defendants' August 20, 1993 document request, and to the extent such documents are claimed not to exist, the plaintiff shall so certify under oath; (3) within 30 days of the production of the an-

swers, documents, and information responsive to items (1) and (2) above, the plaintiff shall submit to an oral examination at which the plaintiff shall provide true, complete and responsive answers to questions posed to him, including questions relating to his competency to testify and *inter alia* the exact identity, time and dosage of any and all drugs ingested by him within 12 hours of his examination and during that examination; the plaintiff is free to tape record this deposition, but such a tape recording shall be in addition to, and not in lieu of, a traditional, independently, stenographically-recorded transcript of the entire deposition, which transcript shall be the official record of the deposition.

Plaintiff's unsubstantiated allegations that defendants' counsel tampered with his documents do not merit being addressed on this record; if plaintiff wishes to pursue these allegations, he is hereby ORDERED to disclose to defense counsel in writing within 20 days hereof the name, identity, and description of the Staples employee(s) who allegedly told him that defense counsel had tampered with plaintiff's documents, or be forever barred from making such an allegation;

/s/ Thomas P. Smith
THOMAS P. SMITH
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 5:92 CV 345 (TFGD)

APOSTOLOS TSIMBIDAROS,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES and PAINTERS LOCAL UNION 1719,
Defendants

August 21, 1993

MOTION FOR SANCTIONS AGAINST THE ATTORNEYS FOR THE DEFENDANTS AND THE STENOGRAPHER

October 12, 1993. This motion is DENIED. This motion is unsupported by an affidavit or even a coherent memorandum. The papers in opposition to this motion demonstrate the reasonableness of defendants' suspension of the deposition in the circumstances. If the plaintiff wants to make a specific accusation that a particular individual stole his documents(s), he is free to do so by way of affidavit. Should such an affidavit be forthcoming, the court will address it in the normal course of business.

/s/ Thomas P. Smith
THOMAS P. SMITH
U.S. Magistrate Judge

[Filed Jul. 5, 1994]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 5:92-345 (TFGD)

APOSTOLOS TSIMBIDAROS,
Plaintiff

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, *et al.*,
Defendants

RULING ON DEFENDANTS' JOINT MOTION FOR DISMISSAL

Plaintiff, proceeding *pro se*, brought this action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that defendants violated § 221 of the constitution of the International Brotherhood of Painters and Allied Trades by not assigning workers in accordance with required geographical quotas.

On October 12, 1993, the court filed several rulings relating to discovery in this case, and plaintiff's failure to follow one of those orders is the subject of the instant motion. (Margin Endorsement on Filing 115, Filed Oct. 12, 1993 [hereinafter "October Order" or "Order"]). Under the terms of the Order, plaintiff was directed to answer defendants' interrogatories and requests for production within twenty days. By the terms of the order plaintiff's compliance was due by November 2, 1993. Absent any response by the plaintiff, defendants filed a motion for sanctions on November 15, 1993. This motion was denied without prejudice to renewal upon the District Judge's ruling on plaintiff's then-pending objec-

tions. Although Judge Daly overruled each of plaintiff's objections, defendants did not renew that motion.

Plaintiff purportedly responded to the discovery requests on or about January 19, 1994. The manner of compliance, however, has forced the defendants to file an additional motion for sanctions in which they request that this case be dismissed with prejudice or, in the alternative, that a further order issue from this court.

The October Order directed the plaintiff to:

> within twenty days of this date provide complete, non-evasive, fully-responsive and sworn answers to the interrogatories that defendants served on him on or about August 2, 1993.

(Margin Endorsement on Filing 115, Filed Oct. 12, 1993). Defendants received answers to their interrogatories on or about January 19, 1994. (Defs.' Joint Mot., Filing 173, at 3). The responses, however, were neither signed nor sworn. The Federal Rules mandate that interrogatories to parties must be answered under oath or objected to. Fed. R.Civ.P. 33(a). As noted in the October Order, no valid objections had been made to the interrogatories dated August 2, 1993.

Plaintiff does not deny that the interrogatories were neither signed nor sworn, Filing 175 at 3, but instead interposes as his excuse for disobeying an order of this court the allegation that Mr. McCarry did not tell him which of two sets of interrogatories McCarry wanted him to answer. Even assuming McCarry's failure to respond to plaintiff's inquiry, however, it is not in dispute that plaintiff did answer interrogatories. The reason why the answers he did provide were not signed under oath is a mystery that plaintiff chooses not to aid the court in resolving. The subject of this mystery, however, not only constitutes a violation of an express order issue by this court but also demonstrates the plaintiff's apparent refusal to cooperate in even the simplest discovery procedures.

The October Order also directed the plaintiff to produce, within twenty days:

> each and every document not heretofore produced which is responsive to the defendants' August 20, 1993 document request, and to the extent such documents are claimed not to exist, the plaintiff shall so certify under oath . . . .

(Margin Endorsement on Filing 115, Filed Oct. 12, 1993.) Despite the terms of the Order, plaintiff's response to the request for production, also received by the defendants on or about January 19, 1994, consisted of a general objection to the request (appearing in his response to the first numbered request), stating that "plaintiff is objecting [to] portions of these questions as unrelated, [mixed?] and above all vague and ambiguous." (Pl.'s Resp. to Def.s' Request for Produc., Defs.' Joint Mot., Filing 173, Ex. B). Plaintiff's opposition to the motion for sanctions makes it patently clear that plaintiff has responsive documents and that he has not produced them.[1] The only explanation plaintiff proffers is that he "was physically unable to drive to Hartford or to Washington D.C. to give the documents to the defendants, NOR has the money to make copies and sent [sic] them to the attorneys representing the defendants." (Pl.'s Mem. in Opp'n, Filing 175, at 2). Plaintiff, in derogation of a court order as well as his obligation to cooperate in discovery, reasons that if the defendants "really wanted the documents, they should make the initiative and accepting responsibility and not constantly complaining to the . . . court." (*Id.*). Unfortunately, given plaintiff's complete lack of cooperation in discovery, resort to the court's intervention is all the defendants have left.

The Federal Rules provide for dismissal as a sanction ("[i]f a party . . . fails to obey an order to provide or

[1] In response to the first numbered request, for example, plaintiff inexplicably states that he "has more documents available for the defendants at their request." (*Id.*).

permit discovery." Fed.R.Civ.P. 37(b)(2)(C). This sanction is also available in the event a party fails to answer interrogatories or document requests. Fed.R.Civ.P. 37(d). Although expressly available under the Rules, dismissal of a cause of action is a harsh remedy to be used only in extreme circumstances, *Theilmann v. Rutland Hosp., Inc.*, 455 F.2d 853, 855 (2d Cir. 1972), and only when the court finds "the requisite 'element of willfulness or conscious disregard' for the discovery process." *Founding Church of Scientology v. Webster*, 802 F.2d 1448, 1458 (D.C. Cir. 1986) (citations omitted), *cert. denied*, 484 U.S. 871 (1987); *see also Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 764 (2d Cir. 1990).

On this record the court finds that dismissal is inappropriate. While the fact that a party is proceeding *pro se* does not excuse the party from complying with court orders, *McDonald v. Head Criminal Court Supervisor Officer*, 850 F.2d 121, 124 (2d Cir. 1988), "*pro se* litigants are not generally familiar with the procedures and practices of the courts" and "must . . . be made aware of the possible consequences of their actions." *Bobal*, 916 F.2d at 764. Plaintiff has been warned once of the possibility of dismissal with prejudice should he continue to violate his discovery obligations.[2] Nevertheless, plaintiff's responses to both the interrogatories and production request were sent to the defendants, albeit in an unacceptable form. The fact that it has taken defendants over four months to bring this to the court's attention certainly is a factor militating against dismissing this case.

Defendants, however, are entitled to the information sought in a form consistent with the Federal Rules. Accordingly their motion (filing 173), treated in the alternative as a motion to compel, is GRANTED. The court hereby ORDERS that within twenty days of the date of this Ruling plaintiff SHALL:

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[2] *See* Margin Endorsement on Filing 101, Filed Oct. 12, 1993.

(1) provide complete, non-evasive, fully responsive and sworn answers to the interrogatories that defendants served on him on or about August 2, 1993; AND FURTHER SHALL

(2) *produce* and, in a manner arrived at through consultation with defendants' counsel, *deliver* each and every document not heretofore produced which is responsive to the defendants' August 20, 1993, document request, and to the extent such documents are claimed not to exist or not in plaintiff's custody or control, the plaintiff shall so certify under oath.

Within thirty days of the twenty-day deadline established above, plaintiff hereby is ORDERED to submit to a deposition at which he SHALL provide true and responsive answers to the questions posed to him, including questions related to his competency to testify and the identity, time and dosage of any and all drugs ingested by him within the preceding twelve-hour period.

The court is mindful that the terms of this Order are virtually identical to the terms of the October Order. As such, obtaining this Order not only needlessly has distracted this case from the litigative process but also wastefully drained the limited resources of this court. The plaintiff is cautioned that his failure to obey this or any other Order of this court or any further manifestation of a continued failure to cooperate in discovery will result in this case being dismissed with prejudice.

It is so ordered.

Dated at Hartford, Connecticut, this 5th day of July, 1994.

/s/ Thomas P. Smith
THOMAS P. SMITH
U.S. Magistrate Judge

[Filed Apr. 3, 1994]

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. 5:92-345 (AWT)

APOSTOLOS TSIMBIDAROS,
Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF PAINTERS & ALLIED TRADES, *et al.*,
Defendants.

RECOMMENDED RULING ON DEFENDANTS' JOINT MOTION FOR DISMISSAL WITH PREJUDICE

The plaintiff, proceeding *pro se*, brought this action under section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, alleging that the defendants violated § 221 of the constitution of the International Brotherhood of Painters and Allied Trades by not assigning workers in accordance with required geographical quotas. The defendants move to dismiss the complaint with prejudice under Fed.R.Civ.P. 37(b)(2)(C) because the plaintiff has repeatedly disregarded court orders and failed to cooperate with discovery, causing the defendants to incur substantial expenses. The issue before the court is whether the plaintiff's refusal to attend his deposition warrants dismissal of the action with prejudice.

For the reasons stated below, the defendants' motion for dismissal with prejudice should be GRANTED, and the defendants should be awarded costs and attorneys' fees.

FACTS

After an examination of the complaint, prior rulings, and other pleadings filed in this matter, the court finds the following undisputed facts. The defendants first attempted to take the plaintiff's deposition on August 19, 1993. During the first question posed to him, the plaintiff read a prepared statement, claiming that he would not be bound by his testimony because he was taking certain prescription medication. The defendants immediately stopped the deposition. According to the defendants, the plaintiff refused to provide any proof that he was actually taking medication or proof of a discernible effect on his mental proficiency.

The defendants subsequently filed a motion to compel discovery. On October 12, 1993, this court ruled that the defendants in this case have the right to take the plaintiff's deposition.[1] This court also held that it is reasonable that the deposition which the defendants seek to take be conducted in the office of the defendants' attorney. In addition, this court specifically ordered the plaintiff to attend the deposition and warned the plaintiff that his "failure to attend his deposition may result in the imposition of drastic sanctions, including dismissal of the lawsuit with prejudice." This court ordered the deposition to be scheduled within thirty days of the plaintiff's compliance with the interrogatories that the defendants served on him on or about August 2, 1993.

The plaintiff repeatedly failed to comply with the discovery procedures. In its July 5, 1994 ruling on another of the defendants' motions to compel discovery, this court specifically ordered the plaintiff to submit to a deposition. This time, the plaintiff was warned that "his failure to obey this or any other order of this court or any further manifestation of a continued failure to cooperate in dis-

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[1] Margin Endorsement on Filing 101, dated Oct. 12, 1993.

covery will result in this case being dismissed with prejudice." [2]

On January 10, 1995, the plaintiff finally complied with the defendants' interrogatories. That same day, the defendants scheduled the plaintiff's deposition for January 26, 1995 at 10:30 a.m. at the office of the defendants' attorney in East Hartford, Connecticut. The defendants sent notice to the plaintiff and specifically asked the plaintiff to provide advance notice if he was unable to attend because the attorney for International Brotherhood would be flying in from Washington, D.C..

On January 18, 1995, the plaintiff filed motions for written questions to the deposition and for the deposition to be taken by telephone. The plaintiff did not file for an extension of time. On January 18, 1995, the defendants' counsel advised the plaintiff in writing that he was expected to attend his deposition in the absence of court action on his motions,[3] and the defendants' counsel then renewed his request that the plaintiff provide advance notice in the event that he would not attend.

The plaintiff failed to attend his deposition on January 26, 1995. According to the defendants, the plaintiff did not notify them that he would be absent. The defendants' attorneys and a court reporter were in attendance at the scheduled time and place, and the record was kept open for two hours. According to statements and itemizations submitted by the defendants, they incurred costs and attorneys' fees in the amount of $2,344.00 as a result of this attempt to depose the plaintiff.

STANDARD

The Federal Rules provide for dismissal as a sanction "[i]f a party . . . fails to obey an order to provide or

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[2] Ruling on Defendants' Joint Motion for Dismissal, Filing 182, dated July 5, 1994.

[3] These motions were denied by this court on January 30, 1995. *See* Margin Endorsement on Filings 215 & 216, Filed Jan. 30, 1995.

permit discovery." Fed.R.Civ.P. 37(b)(2)(C). This sanction is also available in the event a party fails to answer interrogatories or document requests. Fed.R.Civ.P. 37(d). Although expressly available under the Rules, dismissal of a cause of action is a harsh remedy to be used only in extreme circumstances, *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2nd Cir. 1972), and only when the court finds "willfulness, bad faith, or any fault on the part of the prospective deponent." *Bobal v. Rensselaer Polytechnic Inst.*, 916 F.2d 759, 764 (2nd Cir. 1990).

DISCUSSION

The fact that the plaintiff is proceeding *pro se* does not excuse him from complying with court orders. *McDonald v. Head Criminal Court Supervisor Officer*, 850 F.2d 121, 124 (2nd Cir. 1988). While "*pro se* litigants are not generally familiar with the procedures and practices of the courts" and must "be made aware of the possible consequences of their actions," *Bobal*, 916 F.2d at 764, the plaintiff has repeatedly been informed of his discovery obligations and warned by this court that the case would be dismissed with prejudice should he continue to violate those obligations. Moreover, the plaintiff disobeyed a direct order of this court to attend his deposition.

Conscious disregard for court orders and the discovery process justifies the sanction of dismissal. *Minotti v. Lensink*, 895 F.2d 100 (2nd Cir. 1990). When *pro se* litigants flout the obligation to comply with court orders, "they, like all litigants, must suffer the consequences of their actions." *Baker v. Ace Advertising Service, Inc.*, 153 F.R.D. 38, 40 (S.D.N.Y. 1992). In the present case, the plaintiff failed to heed discovery orders on several occasions, thereby delaying the case for approximately eighteen months.

The court finds that the plaintiff willfully failed to appear at his scheduled deposition in January 1995 without offering the defendants any prior notice. The plaintiff offers no excuse for failing to inform the defendants

that he would not attend the deposition. He claims that he had already stated in his "paperwork . . . that he was not going to East Hartford on the account of his operations and the possibility of bad weather."

With regard to his direct disobedience of this court's order, the plaintiff states that at the time of the order, the court was unaware of the following: (1) "plaintiff would have 2 operations within 5 months;" (2) "the defendants would deliberately 'pick and choose' the end of January to take plaintiff's deposition in East Hartford;" and (3) "the defendants will deliberately 'stay low' the whole summer just to gain unfair advantagement [sic] of a sick plaintiff." The court finds each of these arguments to be wholly without merit. If the plaintiff is attempting to claim a medical excuse as his reason for failing to appear at the scheduled deposition, he has provided the court with absolutely no proof.

In his brief opposing the motion to dismiss with prejudice, the plaintiff makes numerous allegations of attorney misconduct. Specifically, he accuses counsel for the defense of the following: "making obscene telephone calls and harassing plaintiff . . . playing with plaintiff's mailbox . . . filing paperwork without providing plaintiff copies . . . and using the same 'lollypop' and pouring crocodile tears and citing irelevant [sic] cases to impress the honorable court." While these are all very serious allegations, none of them is supported by any factual proof, nor is one of them even remotely responsive to the issue before the court.

The closest that the plaintiff comes to directly responding to the motion to dismiss is his statement that "rule 37(b)(2)(C) does not meet the requirements for a dismissal and all the cited cases by the defendant are irelevant [sic]." The plaintiff offers no facts, legal arguments, or case law to support his assertions.

With regard to the issue of costs and attorneys' fees, the plaintiff's only assertion is that the bill of $2,344.00

is "outrageous." However, he does not specifically contest any of the itemized charges.[4]

In sum, the court finds that the plaintiff knowingly and willfully disobeyed an order by this court to attend his deposition. This court has warned the plaintiff on several occasions that his case would be dismissed with prejudice if he refused to comply with discovery. Accordingly, this court holds that the sanction of dismissal with prejudice against this *pro se* plaintiff is warranted and that costs and attorneys' fees are justified.

CONCLUSION

For all the foregoing reasons, the defendants' joint motion for dismissal with prejudice (filing 220) should be GRANTED, and costs and attorneys' fees in the amount of $2,344.00 should be awarded to the defendants.

Either party may seek review of this report and recommendation as provided in 28 U.S.C. § 636(b) (written objections to recommended ruling must be filed within ten days of service of the same); Fed.R.Civ.P. 6(a), 6(e), & 72; and Rule 2 of the Local Rules for United States Magistrate Judges (D. Conn.). Failure to object in a timely manner may preclude further review. *Small v. Secretary of Health and Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

Dated at Hartford, Connecticut this 7th day of April, 1995.

/s/ Thomas P. Smith
THOMAS P. SMITH
United States Magistrate Judge

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[4] The defendants have submitted statements breaking down their expenses associated with the attempt to depose the plaintiff. This court finds the expenses submitted to be reasonable with respect to the January 1995 deposition. The defendants have also submitted expenses relating to an earlier deposition in August 1993. Recovery of these costs is denied.